



FEDERAL ELECTION COMMISSION  
WASHINGTON D C 20463

AUG 16 2004

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

J. Curtis Herge, Esq.  
Herge, Sparks & Christopher, LLP  
Suite 360  
6862 Elm Street  
McLean, VA 22101

RE MUR 5333  
John Swallow for Congress and  
Stanley R deWaal, as treasurer

Dear Mr. Herge.

On November 21, 2002, the Federal Election Commission notified your clients, John Swallow for Congress and Stanley R. deWaal, as treasurer ("Committee"), of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your clients at that time

Upon further review of the allegations contained in the complaint, and information provided by you, the Commission, on June 30, 2004, found that there is reason to believe the Committee violated 2 U.S.C. §§ 441b(a), 441a(f), 441f and 434(b)(3)(A), provisions of the Act. The Factual and Legal Analysis, which formed a basis for the Commission's findings, is attached for your information. Also on June 30, 2004, the Commission took the following actions

1. Found no reason to believe that the Committee violated 2 U.S.C. § 441a(f) in connection with the contributions from Dell Allen, Roger Barrus, W R Bradley, Danica M. Campbell, Lavar Christensen, Fonda L Eastman, Michael Ellis, Monica Ellis, Corby Facer, Jillyn Facer, Rebecca Facer, Tyson Facer, James R Fraser, Sharon E Fraser, John L Harmer, Victor Iverson, Larry H Miller, Bradley D Pelo, Melody A. Pelo, Mandi Robinson, Timothy V Stay or Robert Whitman;
2. Dismissed the complaint with respect to the Committee in connection with the contributions from Donna Swallow, Charlotte P. Jonas and W. James Jonas,

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3. Took no action at this time with respect to the Committee in connection with the contributions from Robert B. Lichfield, Lenae Lichfield, Lonı Lichfield, Lyndee Lichfield, Patricia Lichfield, Reagan Lichfield, Robbie Lichfield, Roger Lichfield, Stephanie Lichfield and Tavia Lichfield;
4. Found no reason to believe that the Committee violated the Act in connection with the contributions from Britta Lynn Facer or Riley Todd Facer, and
5. Dismissed the complaint with respect to the Committee in connection with the alleged receipt of excessive contributions from Brent Facer

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of your receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

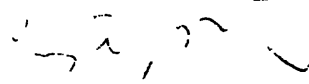
This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

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J. Curtis Herge, Esq.  
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If you have any questions, please contact Mark Allen, the attorney assigned to this matter,  
at (202) 694-1650

Sincerely,



Bradley A. Smith  
Chairman

Enclosure  
Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3  
4 RESPONDENTS: John Swallow for Congress and Stanley R. deWaal, MUR 5333  
5 as treasurer  
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7 **I. GENERATION OF MATTER**

8 This matter was generated by a complaint filed with the Federal Election Commission by  
9 Scott Clayton alleging that John Swallow for Congress and Stanley R. deWaal, as treasurer,  
10 ("Committee") accepted excessive contributions and contributions made in the names of  
11 children, in violation of the Federal Election Campaign Act of 1971, as amended ("the Act")  
12 *See* 2 U.S.C. § 437g(a)(1)

13 **II. FACTUAL AND LEGAL ANALYSIS**

14 **A. Background**  
15

16 The Committee was the principal campaign committee for John Swallow, a candidate for  
17 the U.S. House of Representatives from the Second District of Utah. Mr. Swallow was a  
18 candidate in the 2002 primary election and the 2002 general election. In addition, Mr. Swallow  
19 was a candidate in a third election in 2002, the party convention held prior to the primary  
20 election. *See* Advisory Opinions 1978-30 and 1992-25 (in Utah, the party convention prior to  
21 the primary is considered a separate election with a separate contribution limit). Thus, a  
22 contributor could give up to a total of \$3,000 to the Committee in connection with the 2002  
23 election cycle.  
24  
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**B. Limited Liability Company Contributions**

**1. Complaint and response**

The complaint alleges that four individuals with the last name "Bybee" and four individuals with the last name "Gay" made excessive contributions to the Committee. The complaint listed each of these individuals as contributing \$2,000 to the Committee. The Committee disclosed the receipt from each Bybee of \$1,000, which was designated for the May 11, 2002 convention, on March 31, 2002, and another \$1,000, which was designated for the June 25, 2002 primary election, on June 26, 2002.<sup>1</sup> The Committee disclosed the receipt from each Gay of \$1,000, which was designated for the convention, on March 31, 2002, and \$1,000 which was designated for the general election, on June 28, 2002. As reported on the Committee's disclosure reports, therefore, these contributions are within the limits of 2 U.S.C. § 441a(a)(1)(A).

The Bybee and Gay contributions were made by checks drawn on accounts of Winterfox, LLC ("Winterfox") and Winterhawk Enterprises ("Winterhawk") and attributed to the several Bybee and Gay contributors, as set forth in the chart below. Winterfox and Winterhawk are limited liability companies ("LLCs") identified in public records as active LLCs organized in Utah.<sup>2</sup>

<sup>1</sup> Contributions designated for the primary *after* that election could only be so designated to the extent the contributions did not exceed the Committee's net debts outstanding from that election. See 11 C.F.R. § 110.1(b)(3)(i). There appear to have been net debts outstanding from the primary election. The Committee's July Quarterly Report covering through June 30, 2002 disclosed \$29,621 ending cash on hand and \$67,732 in debts.

<sup>2</sup> Winterhawk is listed in public records as Winterhawk Enterprises, LLC.

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Check drawn on account	Check date	Amount	Attributed persons (\$1,000 each)
Winterfox, LLC	3/28/02	\$5,000	Evan Bybee, Tamra Bybee, Taige Bybee, Kara Davis, Nicaïl Bybee
Winterfox, LLC	6/28/02	\$5,000	Evan Bybee, Tamra Bybee, Taige Bybee, Nicaïl Bybee, Brenn Bybee
Winterhawk Enterprises	3/29/02	\$4,000	Dennis Gay, Gina Gay, Bodee Gay, Kim Gay
Winterhawk Enterprises	6/21/02	\$5,000	Dennis Gay, Gina Gay, Bodee Gay, Kim Gay, Haley Gay

1  
2 In the first instance, Winterfox wrote a \$5,000 check to the Committee dated March 28,  
3 2002, signed by Evan Bybee, with a memo line reading "From Evan, Tamra, Taige, Kara, Nicaïl  
4 \$1000 ea," i.e., the four Bybees and Kara Davis. The Committee provided a copy of a letter its  
5 treasurer sent to Winterfox, dated April 4, 2002, expressing thanks for the contribution and then  
6 stating.

7 The strict Federal Election Commission regulations [prohibit] making contributions on  
8 behalf of someone else to federal election campaigns. We must refund this money to you  
9 within thirty (30) days unless you can establish in writing that the contribution came from  
10 personal funds of a corporate drawing account, such as a draw against salary, wages,  
11 dividends, etc. Please confirm that such was indeed the case with this check by signing  
12 below....  
13

14 The letter provides fields for the signature, occupation, employer and date of each Bybee and of  
15 Kara Davis. The completed fields contain signatures, occupations and employers for all five  
16 individuals dated April 10 and 11, 2002. One of the five, Tamra Bybee, listed Winterfox as her  
17 employer; Taige Bybee and Nicaïl Bybee listed other entities, and Evan Bybee and Kara Davis  
18 listed "self." The Committee did not disclose Winterfox as the employer of any of the five  
19 individuals.

20 In the second instance, Winterfox wrote a \$5,000 check to the Committee dated June 28,  
21 2002, that was signed by Evan Bybee and contained a memo line reading "1,000 ea Evan, Tamra  
22 Bybee, Taige Bybee, Nicaïl Bybee, Brenn Bybee," i.e., the four Bybees noted above and Brenn

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1 Bybee The Committee's responses did not contain a copy of any letter regarding the June 28,  
2 2002 Winterfox check.

3 Regarding the Gay contributions, Winterhawk wrote a \$4,000 check to the Committee  
4 dated March 29, 2002. The signature on the check appears to be that of Dennis Gay and the  
5 memo line reads "Dennis, Gina, Bodee, Kim Campaign Donation." The Committee provided a  
6 copy of a letter that the Committee sent to Winterhawk containing the same request as in the  
7 letter to Winterfox quoted above, informing Winterfox that the contribution would have to be  
8 refunded unless it was established in writing that the contribution came from "personal funds of  
9 a corporate drawing account." The Committee's letter, dated March 31, 2002, provides fields for  
10 the signature, occupation, employer and date of each Gay. The completed fields contain the  
11 signatures of all four individuals dated April 10, 2002, and identify "Majestic ent,"<sup>3</sup> as the  
12 employer of all four individuals.<sup>4</sup>

13 Finally, Winterhawk wrote a \$5,000 check to the Committee on June 21, 2002. The  
14 signature on the check appears to be that of Dennis Gay and the memo line reads "Dennis, Gina,  
15 Bodee, Kim, Haley Campaign Dona" [sic]. The Committee provided a copy of an undated letter  
16 to Winterhawk regarding the contribution, identical to its March 31, 2002 letter to Winterhawk.  
17 The Committee's undated letter makes no mention of Haley Gay, the fifth attributed contributor.  
18 The completed fields contain the signatures of the four Gay contributors, with dates ranging from

<sup>3</sup> Utah state records indicate three business entities whose names start with "Majestic ent," all of which are expired. Nevada state records list "Majestic Media Holdings, Inc.," with Gina Gay as president and Dennis Gay as secretary and treasurer.

<sup>4</sup> The Committee's disclosure report identified Winterhawk as the employer of all four individuals.

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1 September 20 to September 25, 2002, and identify "Majestic" as the employer of three  
2 individuals.<sup>5</sup>

3 **2. Law on contributions by LLCs, corporations and partnerships**

4 The Commission's regulations establish two possible treatments for contributions by  
5 business entities that are recognized as limited liability companies under the laws of the State in  
6 which they are established. 11 C.F.R. § 110.1(g)(1). The treatment depends on how the firm  
7 elects to file with the Internal Revenue Service ("IRS"). *Id.* at 110.1(g)(2). If the contribution is  
8 from an LLC filing with the IRS as a partnership pursuant to 26 C.F.R. § 301.7701-3, or from  
9 one that fails to make an election, it shall be treated as a contribution from a partnership pursuant  
10 to 11 C.F.R. § 110.1(e). *Id.* If the contribution is from an LLC electing to file with the IRS as a  
11 corporation, the contribution is prohibited. 2 U.S.C. § 441b(a) and 11 C.F.R. § 110.1(g)(3). An  
12 LLC that makes a contribution pursuant to this provision shall, at the time it makes the  
13 contribution, provide information to the recipient committee as to how the contribution is to be  
14 attributed, and affirm to the recipient committee that it is eligible to make the contribution.  
15 11 C.F.R. § 110.1(g)(5).

16 The Act prohibits corporations from making contributions in connection with any  
17 election and prohibits any candidate or political committee from knowingly accepting or  
18 receiving any such contributions. 2 U.S.C. § 441b(a). In addition, section 441b(a) prohibits any  
19 officer or director of any corporation from consenting to any contribution by the corporation.  
20 The Commission has recognized, however, limited circumstances in which a corporate employee  
21 may make a contribution drawn on a corporate account, specifically, a nonrepayable corporate

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<sup>5</sup> The employer field is blank for the fourth individual, Dennis Gay. The Committee disclosed Winterhawk as the employer of all four individuals.



1 drawing account established to permit an employee to draw against her salary, profits or other  
2 compensation. *See Campaign Guide for Congressional Candidates and Committees* (2002),  
3 page 21; *FEC Record*, September 1978, page 1<sup>6</sup> Contributions may not be made from the  
4 general treasury fund of corporations. *See 2 U S C § 441b(a), cf FEC v Massachusetts Citizens*  
5 *for Life*, 479 U.S. 238, 241 (1986)

6 A contribution by a partnership shall be attributed to the partnership and to each partner  
7 in one of two ways: 1) in proportion to his or her share of the profits, according to instructions  
8 which shall be provided by the partnership to the political committee or candidate; or 2) by  
9 agreement of the partners, as long as only the profits of the partners to whom the contribution is  
10 attributed are reduced (or losses increased), and these partners' profits are reduced (or losses  
11 increased) in proportion to the contribution attributed to each of them 11 C.F.R. § 110.1(e). A  
12 contribution by a partnership shall not exceed the Act's limitations on contributions, and no  
13 portion of such contribution may be made from the profits of a corporation that is a partner. *Id*

### 14 3. Analysis of contributions

15 Winterfox and Winterhawk, LLCs, wrote \$19,000 in contribution checks to the  
16 Committee. They attributed these amounts to the individuals noted above. No contributions  
17 were attributed to the LLCs themselves. The threshold question regarding LLC contributions is  
18 whether the LLC is to be treated as a corporation or as a partnership, which depends on whether  
19 the LLC elected federal income tax treatment as a corporation. *See 11 C F R § 110.1(g)* The

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<sup>6</sup> The only place in the Act or the Commission's regulations that specifically addresses the making of contributions through nonrepayable corporate drawing accounts is in the context of contributions to separate segregated funds. *See 11 C F R § 102.6(c)(3)* This regulation provides that a contributor may write a check that represents both a contribution and payment of dues or other fees that must be drawn on the contributor's personal checking account or on a "non-repayable corporate drawing account of the individual contributor." *Id.* *See also* Explanation and Justification, 48 Fed. Reg. 26,297 (June 7, 1983)

1 available information does not indicate whether Winterfox and Winterhawk elected tax treatment  
2 as corporations.

3 The LLC checks on their face attribute the contributions among several individuals, but it  
4 does not appear that the LLCs affirmed to the Committee that they are eligible as entities to  
5 make the contributions in the first place. See 11 C.F.R. § 110.1(g)(5). Instead, the Committee's  
6 letters in response to three of the four LLC contribution checks invite the attributed individual  
7 contributors to categorize the contributions as coming from "personal funds of a corporate  
8 drawing account, such as a draw against salary, wages, dividends, etc." Each individual  
9 contributor appeared to agree with this categorization by signing in the space provided. While  
10 the Commission permits contributions from corporate employees drawn on nonrepayable  
11 corporate drawing accounts, *see supra*, the contributions here do not appear to be drawn on such  
12 accounts. First, the checks appear to be drawn on the general treasury accounts of the LLCs, no  
13 account name is indicated on the checks relating to a possible nonrepayable drawing account.  
14 Second, the attributed individual contributors may not even be employees of the LLCs. As noted  
15 above, only a single attributed contributor listed the corresponding LLC as her employer.  
16 Interestingly, in the case of the Winterhawk contribution checks, none of the attributed  
17 contributors listed Winterhawk as their employer, but the Committee disclosed Winterhawk as  
18 the employer of all four individuals.

19 Thus, if the LLCs have elected federal income tax treatment as a corporation, these LLC  
20 contribution checks may constitute impermissible corporate contributions. If, in the alternative,  
21 the LLCs are treated as partnerships, their checks to the Committee constitute contributions from

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the LLCs themselves as well as from the “partners” of the LLCs. *See* 11 C.F.R. § 110.1(e).<sup>7</sup>

Thus, Winterfox, LLC, in writing two checks to the Committee in the amount of \$5,000, contributed \$10,000 to the Committee in connection with the convention and primary elections, well in excess of the statutory limit. Similarly, Winterhawk, in writing checks to the Committee in the amounts of \$4,000 and \$5,000, contributed \$9,000 to the Committee in connection with the convention and general elections, also in excess of the statutory limit.

As for the “partners” of these LLCs, public records from Utah identify G. Evan Bybee and Targe Bybee as members of Winterfox, and Dennis Gay and Gina Gay as members of Winterhawk. By analogy, these members may be the “partners” to which the LLC contributions may be attributed if the LLCs are treated as partnerships. *See* 11 C.F.R. § 110.1(e) (such attribution shall be in proportion to each partner’s share of the profits, or, by agreement of the partners, as long as only the profits of the partners to whom the contribution is attributed are reduced and these partners’ profits are reduced in proportion to the contribution attributed to each of them). Attributing the LLC contributions among the members/partners appears to result in excessive contributions on the part of those individuals. Winterfox’s \$10,000 in contributions is attributed \$5,000 each to Evan Bybee and Targe Bybee, and Winterhawk’s \$9,000 in contributions is attributed \$4,500 each to Dennis Gay and Gina Gay.

Finally, there appear to be contributions made in the name of another whether the LLCs were treated as corporations or as partnerships. *See* 2 U.S.C. § 441f. If the LLCs were treated as corporations, then the LLCs made contributions in the names of the various individuals to whom the contributions were attributed. If the LLCs were treated as partnerships, then the attributed

<sup>7</sup> Persons with an ownership interest in an LLC are called “members” rather than “partners.” *See* Utah Revised Limited Liability Company Act, Utah Code Ann. § 48-2c-102(14).

partners made contributions in the names of the other individuals who are not partners. *See*

2 U.S.C. § 441f

Although the Committee did make inquiries regarding three of the four LLC contribution checks, the Committee did not inquire as to the treatment of the LLCs as corporations or partnerships, but rather appeared to have assumed that the LLCs were treated as corporations and that checks drawn on corporate accounts could be attributed to individuals through the mechanism of a drawing account. As noted above, most of the employees did not identify the LLC as their employer. Thus, the Committee does not appear to have made "best efforts" to determine the legality of the contributions. *See* 11 C.F.R. § 103.3(b)(1). Therefore, there is reason to believe that John Swallow for Congress and Stanley R. deWaal, as treasurer, violated 2 U.S.C. § 441b(a) for knowingly receiving corporate contributions and, in the alternative, violated 2 U.S.C. § 441a(f) for knowingly receiving excessive contributions. There is also reason to believe that John Swallow for Congress and Stanley R. deWaal, as treasurer, violated 2 U.S.C. § 441f for knowingly accepting contributions made in the name of another. Finally, there is reason to believe that John Swallow for Congress and Stanley R. deWaal, as treasurer, violated 2 U.S.C. § 434(b)(3)(A) for failing to report the receipt of contributions from the LLCs.

**C. Partnership contributions**

The complaint alleges that Brett Facer made excessive contributions to the Committee. The complaint listed Mr. Facer as contributing \$2,000 to the Committee. In fact, the Committee disclosed the receipt of \$3,000 from Mr. Facer, in each case \$1,000 designated for each of the convention, primary and general elections. Therefore, these contributions are on their face within the limits of 2 U.S.C. § 441a(a)(1)(A).

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1           The contributions by Brent Facer do raise questions. His first two \$1,000 contributions  
2           were made by checks drawn on the account of "BMF #1, Ltd." with "Brent Facer –  
3           Contribution" typed in the memo line; the checks appear to be signed by Mr. Facer. His third  
4           contribution, made by a check drawn on a different account and imprinted with the names "BMF  
5           #1, Ltd.," "Brent M. Facer" and "Jillyn P. Facer" also appears to be signed by Mr. Facer. The  
6           memo line reads "Brent Facer – Contribution" and an accompanying check register contains the  
7           handwritten notation "Personal fund" [sic]. The Committee provided a copy of a letter its  
8           treasurer sent to Brent Facer, dated June 20, 2002, after the second BMF #1 check. The letter  
9           thanks Mr. Facer for his contribution and then states:

10           The strict Federal Election Commission regulations prohibit making contributions from a  
11           non-personal account to a federal election campaign. We must refund this money to you  
12           within thirty (30) days unless you can establish in writing that the contribution came from  
13           personal funds of a corporate drawing account, such as a draw against salary, wages,  
14           dividends, etc. Please confirm that such was indeed the case with this check by signing  
15           below....

16  
17           The letter provided fields for Brent Facer's signature, date, occupation and employer. The  
18           completed fields contain Mr. Facer's signature dated July 3, 2002, his occupation as "partner"  
19           and his employer as BMF #1, Ltd.

20           Public records identify BMF #1, Ltd. ("BMF #1") as an active limited partnership  
21           organized in Utah, with Brent Facer as the registered agent and BMF Management, LLC ("BMF  
22           Management") as general partner. Public records do not identify any limited partners. BMF  
23           Management, in turn, is shown to have two members, Brent Facer and Jillyn Facer. Thus, the  
24           two contribution checks from BMF #1 constitute contributions from BMF #1 as well as from one

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1 or more attributed partners<sup>8</sup> See 11 C.F.R. § 110.1(e). Here, the contributions are attributed  
2 entirely to Brent Facer, which would be permissible if Mr. Facer were a partner of BMF #1 and  
3 this attribution was the result of an agreement of the partners, *and* only his profits were reduced  
4 as a result of the contributions. See *id.* If, on the other hand, the BMF #1 contributions were  
5 made at least in part with profits of general partner BMF Management, the BMF #1 contributions  
6 would have to be attributed at least in part to BMF Management. This arrangement would raise  
7 the issue of whether this LLC is acting as a partnership or as a corporation, which is determined  
8 by whether it has elected federal tax treatment as a corporation. See 11 C.F.R. § 110.1(g)(2). If  
9 so, attribution of part of the BMF #1 contribution to BMF Management would constitute an  
10 impermissible corporate contribution. See 2 U.S.C. § 441b(a); 11 C.F.R. § 110.1(g)(3).<sup>9</sup> If BMF  
11 Management is instead acting as a partnership, attribution of part of the BMF #1 contribution to  
12 BMF Management would require further attribution of that portion to one or more of the BMF  
13 Management members, one of whom is Brent Facer.<sup>10</sup>

14 The Brent Facer contributions thus present a number of possibilities. In any event, the  
15 Committee failed to disclose the receipt of contributions from BMF #1, and so there is reason to

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<sup>8</sup> The third contribution check, imprinted with the name of the partnership as well as the names Brent Facer and Jillyn Facer, although listed as personal funds, could have included funds commingled between the partnership and Mr. Facer. In any event, the Commission's analysis of the BMF #1 contributions would not change if this third contribution were considered to be made with partnership funds.

<sup>9</sup> The mere existence of BMF Management as a corporate partner of BMF #1 would not by itself necessarily taint a contribution by BMF #1, which could be attributed by agreement of the partners to non-corporate partners. See Advisory Opinion 1980-132.

<sup>10</sup> In response to the second BMF #1 contribution, as noted above, the Committee sent a letter asking Brent Facer whether the contribution came from "personal funds of a corporate drawing account, such as a draw against salary, wages, dividends, etc." BMF #1, however, is a partnership, not a corporation. The Commission has not recognized as permissible contributions made from partnership drawing accounts. Cf. nonrepayable corporate drawing accounts of corporate employees, discussed *supra*.

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John Swallow for Congress  
and Stanley R. deWaal, as treasurer  
Factual and Legal Analysis

- 1 believe that John Swallow for Congress and Stanley R. deWaal, as treasurer, violated 2 U.S.C.
- 2 § 434(b)(3)(A)

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